

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF TRANSPORTATION

In the Matter of the Appeal of  
Ecuadorian Express, LLC of the  
Revocation of the Limousine Permit  
No. 372431

**FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Eric L. Lipman on January 4, 2007, at the Office of Administrative Hearings. The record closed following the receipt of post-hearing submissions by the parties.

Michael A. Sindt, Assistant Attorney General, Bremer Tower, Suite 1800, 445 Minnesota Street, St. Paul, MN 55101-2134, appeared on behalf of the Minnesota Department of Transportation ("the Department").

Michael C. Hager, Hager Law Offices, 270 Grain Exchange North Building, 301 Fourth Avenue, Minneapolis, MN 55415, appeared on behalf of Ecuadorian Express, LLC ("Appellant" or "Ecuadorian Express").

**STATEMENT OF THE ISSUES**

1. Did the operator of Ecuadorian Express willfully refuse to permit officials from the Department of Transportation to audit the business records of Ecuadorian Express?
2. Did the operator of Ecuadorian Express receive proper notice that Limousine Service Permit Number 372431 had been suspended?
3. Was Limousine Service Permit Number 372431 revoked according to the procedures set forth in applicable regulations?

**FINDINGS OF FACT**

1. On April 1, 2006, Carlos Illisaca Farez submitted an application to the Minnesota Department of Transportation for a Limousine Service Permit.<sup>1</sup> On the application, Mr. Farez, listed himself as the sole managing member of Ecuadorian Express, placed the street address of a restaurant owned by him as

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<sup>1</sup> See, Ex. A.

the business address for Ecuadorian Express, and included a telephone number he had secured for dispatch operations, on the application.<sup>2</sup>

2. Mr. Farez listed 2851 Central Avenue, Northeast, Minneapolis, Minnesota 55418, as the business mailing address for Ecuadorian Express.<sup>3</sup>

3. The Department issued Limousine Service Permit Number 372431 to Ecuadorian Express on May 22, 2006.<sup>4</sup>

4. In accordance with the Department's ordinary practice, Kory Wiech, a Transportation Program Specialist with the Department scheduled an audit of the records for Ecuadorian Express for a time shortly after issuance of Limousine Permit 372431. In the view of Department officials, their practice of conducting early audits of operator records helps to improve operator compliance with state record-keeping requirements and to avoid the compounding of regulatory failures over a longer period of time.<sup>5</sup>

5. By telephone call to Ecuadorian Express, Mr. Wiech scheduled for July 7, 2006 an audit of the operator records. When Mr. Farez did not arrive at the appointed time on July 7, Mr. Wiech telephoned the number listed on the application and spoke with a person whom he believed to be Mr. Farez. The review of the records was rescheduled; at first for July 13, 2006, and again for July 24, 2006, when a representative of Ecuadorian Express did not appear for the July 13 review. Following the failure to appear on July 24, 2006, Mr. Wiech E-mailed other Department officials urging a suspension of the operator permit for Ecuadorian Express.<sup>6</sup>

6. Mr. Farez testified at the hearing in this matter that during the relevant time period he employed a dispatcher for Ecuadorian Express that knew and spoke very little English.<sup>7</sup> Among the duties of this dispatcher was to answer the telephone used in the operation of Ecuadorian Express.<sup>8</sup>

7. By way of a letter dated the same day, July 24, 2006, the Department purported to mail a Notice of Suspension to the Central Avenue address listed in the limousine operator permit application submitted by Ecuadorian Express.<sup>9</sup>

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<sup>2</sup> Testimony of Carlos Farez and Ex. A ; *compare generally*, Minn. R. 8880.0400 (2005).

<sup>3</sup> Ex. A.

<sup>4</sup> Testimony of Kory Wiech and Ex. E.

<sup>5</sup> Test. of K. Wiech.

<sup>6</sup> *Id.*

<sup>7</sup> Test. of C. Farez.

<sup>8</sup> *Id.*

<sup>9</sup> *See*, Ex. B.

8. Mr. Farez disclaims ever having received a copy of the Notice of Suspension.<sup>10</sup>

9. At the hearing in this matter the Department offered into evidence a photocopy of the Notice of Suspension. The Notice of Suspension references two Certified Mail tracking numbers – which differ by a single digit “7003 3110 0004 8616 **9126**” and “7003 3110 0004 8616 **6126**.”<sup>11</sup> No return receipt was introduced into the hearing record as to the Notice of Suspension.

10. On August 13, 2006, officers of the Minnesota State Patrol stopped a vehicle licensed to Ecuadorian Express and issued a citation to the driver, Patricio Cajamarca.<sup>12</sup> The citation was issued for operating a limousine without posting of the required decal on the windshield of the vehicle,<sup>13</sup> and operating a vehicle without possession of a driver’s license.<sup>14</sup>

11. Having received no reply from either Mr. Farez or Ecuadorian Express regarding the Notice of Suspension, nor a cure of the failure to submit an audit by September 22, 2006, the Department issued a Notice of Revocation on October 9, 2006.<sup>15</sup> As demonstrated by a return receipt for this item, which bears a signature that Mr. Farez acknowledges, the Notice of Revocation was received by Mr. Farez on or around October 12, 2006.<sup>16</sup>

## CONCLUSIONS

1. The Commissioner of Transportation and the Administrative Law Judge have jurisdiction to consider this matter.<sup>17</sup>

2. The Department gave proper and timely notice of the hearing and has complied with all procedural requirements necessary for setting a hearing on the operator’s appeal. This matter is therefore properly before the Administrative Law Judge.

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<sup>10</sup> Test. of C. Farez.

<sup>11</sup> See, Ex. B.

<sup>12</sup> See, Ex. I.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Ex. C; Test. of K. Wiech.

<sup>16</sup> Ex. C; Test. of C. Farez.

<sup>17</sup> See, Minn. Stat. §§ 14.50 (2006); Minn. R. 8880.1300 (5) (2005).

3. Under Minn. R. 8880.1300, a suspension of the limousine operator's permit may follow from the operator's willful failure to provide the Department with access to the operator's records.<sup>18</sup>

4. Under Minn. R. 8880.1300, a suspension of the permit is effective five days after the Department mails a notice of suspension to the last known address of the operator.<sup>19</sup>

5. Under Minn. R. 8880.1300, among the grounds for revocation of a limousine permit are:

- a. the failure by the operator to have a suspended permit restored within 60 days,<sup>20</sup> and,
- b. providing limousine services during the period in which an operator's permit was under suspension.<sup>21</sup>

6. Under Minn. R. 8880.0500, the revocation of a limousine permit results in a one-year bar to the application for the issuance of a subsequent permit<sup>22</sup>

7. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

8. The Memorandum that follows explains the reasons for these Conclusions, and the Administrative Law Judge therefore incorporates that Memorandum into these Conclusions.

9. Based upon the foregoing Conclusions, and for the reasons set forth in the attached memorandum, the Administrative Law Judge makes the following:

## **RECOMMENDATION**

The Administrative Law Judge respectfully recommends that the:

- (a) Appeal of Ecuadorian Express be GRANTED;
- (b) Notice of Revocation be VACATED; and that the

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<sup>18</sup> See, Minn. R. 8880.1300 (1) (B) (2005).

<sup>19</sup> See, Minn. R. 8880.1300 (3) (2005).

<sup>20</sup> See, Minn. R. 8880.1300 (2) (C) (2005).

<sup>21</sup> See, Minn. R. 8880.1300 (2) (B) (2005).

<sup>22</sup> See, Minn. R. 8880.0500 (1) (A) and 8880.1300 (6) (2005).

- (c) Commissioner RE-ISSUE a Notice of Suspension (perhaps with personal service upon Mr. Farez), permitting Ecuadorian Express with a new 60 day period to come into compliance with the agency's demand for a complete audit, as well as detailed notice of any other claimed violations of Part 8880.

Dated this 15<sup>th</sup> day of March, 2007.

s/Eric L. Lipman

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ERIC L. LIPMAN

Administrative Law Judge

Reported: Tape-recorded (one tape); no transcript prepared.

### **NOTICE**

This report is a recommendation, not a final decision. The Commissioner will make the final decision after a review of the record. The Director may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Commissioner Carol Molnau, Minnesota Department of Transportation, 395 John Ireland Boulevard, Saint Paul, Minnesota 55155-1899, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.63, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail or as otherwise provided by law.

### **MEMORANDUM**

As noted in the Conclusions above, the applicable regulatory scheme is fairly straight-forward. It provides that:

- (1) A suspension of the limousine operator's permit may follow from the operator's willful failure to provide the Department with access to the operator's records;
- (2) A suspension of the permit is effective five days after the Department mails a notice of suspension to the last known address of the operator; and,
- (3) Among the grounds for revocation of a limousine permit are:
  - a. the failure by the operator to have a suspended permit restored within 60 days; and
  - b. providing limousine services during the period in which an operator's permit was under suspension.

The resolution of this appeal pivots on the interplay between these regulations. The parties dispute whether the substantive and procedural requirements for revocation have been satisfied in this case.

### **The “Willful” Failure to Provide Operator Records**

Respondent challenges the Department's claim that he willfully failed to provide the Department access to the records of Ecuadorian Express, LLC on the grounds that he did not receive either the calls or messages from Department officials seeking access to these records. As the Respondent argues, his failure to arrive at the scheduled audits or to submit the sought-after records cannot be considered “willful” under circumstances where his non-English-speaking employee did not accurately transcribe or forward telephone messages to him.

At the core of the Respondent's defense is whether he is entitled to disclaim the conduct and limitations of his own agent, whose duties were to receive and transcribe telephone messages. Such a result is not in accord with the law.

Under Minnesota law, a principal is bound not only by an agent's actual authority, but also by authority that the principal has apparently delegated to him or her.<sup>23</sup> Agents may bind their employers in those cases where: (1) the principal held the agent out as having authority, or must have knowingly permitted the agent to act on its behalf, (2) third parties had actual knowledge that the agent was held out by the principal as having such authority or had been permitted by the principal to act on its behalf, and (3) proof of the agent's apparent authority is found in the conduct of the principal.<sup>24</sup> In such circumstances, the scope of the

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<sup>23</sup> See, e.g., *Duluth Herald & News Tribune v. Plymouth Optical Co.*, 176 N.W.2d 552, 555 (Minn. 1970).

<sup>24</sup> See, *Hockemeyer v. Pooler*, 130 N.W.2d 367, 375 (1964).

agent's authority is determined not only by what the principal knows and acquiesces in, but also by what the principal should, in the exercise of ordinary care and prudence, know that his agent is doing.<sup>25</sup>

In this case, it is uncontested that the Operator, Mr. Farez, hired and retained a non-English speaking dispatch operator to answer telephone calls, at the contact number that he provided to the Department as part of the licensing process.<sup>26</sup> While mindful that the principal clientele of the Operator is Spanish-speaking,<sup>27</sup> the risks that he or Ecuadorian Express would be essentially unavailable by telephone to English-speaking licensing and enforcement officials makes his use of a Spanish-only speaking dispatcher in disregard of obvious risks. Under such circumstances, such conduct can be considered "willful."<sup>28</sup> Moreover, a contrary construction of "willfulness" in this context would allow permit holders to insulate themselves from contact with licensing and enforcement authorities simply by employing "buffer" personnel who (for whatever reason) cannot effectively communicate with these officials.

### **Service of the Suspension Notice and Post-Hearing Submissions**

Concluding that Mr. Farez and Ecuadorian Express, LLC could be subject to a proper suspension order for failure to attend the requested audits, the question then becomes whether the procedures for the later suspension and revocation orders were followed in this case.

During the Administrative Law Judge's review of the hearing record it was important to address the apparent conflict between Mr. Farez's credible testimony to the effect that he did not receive the Department's July 24, 2006 Notice of Suspension, with the documentary evidence on that point.

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<sup>25</sup> See, *Foley v. Allard*, 427 N.W.2d 647, 652 (Minn. 1988) ("Apparent authority is that authority which a principal holds an agent out as possessing, or knowingly permits an agent to assume"); *McGee v. Breezy Point Estates*, 166 N.W.2d 81, 89 (Minn. 1969) ("An agent's apparent authority results from statements, conduct, lack of ordinary care, or other manifestations of the principal's consent, whereby third persons are justified in believing that the agent is acting within his authority").

<sup>26</sup> Compare, Test. of C. Farez and Ex. A with Minn. R. 8800.0400 (2) (B) and 8880.0600 (2) (B) (2005) (applicants for limousine permits and decals must provide a business telephone number).

<sup>27</sup> See, Test. of C. Farez.

<sup>28</sup> See generally, *State v. Cyrette*, 636 N.W.2d 343, 348 (Minn. App. 2001) (individuals have been defined as acting willfully when they have "intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences"); compare also, *In the Matter of the Lawful Gambling License of Hibbing VFW Post 8510 License No. 02002*, 529 N.W.2d 476, 480 (Minn. App. 1995) (the Board properly defined "willful" as 'a disregard for governing statutes and an indifference to their requirements, or a careless disregard of statutory requirements'); *In the Matter of the Administrative Penalty Order to Palm Industries, Inc.*, OAH Docket No. 2-2200-5080-2 (1990) ("Willful conduct is marked by careless disregard of a standard or conduct that results from a conscious, intentional, deliberate or voluntary decision") (<http://www.oah.state.mn.us/alj/Base/22005080.90.htm>).

The Department's Exhibit B, is a photocopy of the Notice of Suspension, and references two Certified Mail tracking numbers – which differ by a single digit “7003 3110 0004 8616 **9126**” and “7003 3110 0004 8616 **6126**.”<sup>29</sup>

While the Department did offer at the hearing a copy of the return receipt from the Notice of Revocation,<sup>30</sup> and Mr. Farez acknowledged receiving that item, no such return receipt was introduced into the hearing record as to the earlier Notice of Suspension. Further, at the hearing, neither the agency witnesses, nor counsel, offered any view at the hearing as to why a return receipt was not offered for the July 24, 2006 Notice of Suspension.

It is widely known that the United States Postal Service offers to its customers the ability to track items sent by registered or certified mail, through its internet site. When the tracking number is entered into this system, the Postal Service asserts that item “7003 3110 0004 8616 **9126**” was accepted for delivery, on August 21, 2006, by “C. Snidarich” in Saint Paul, Minnesota.<sup>31</sup> According to this same service, the Postal Service has no record of acceptance of an Item numbered “7003 3110 0004 8616 **6126**.”<sup>32</sup>

By way of a letter to counsel of February 1, 2007, the Administrative Law Judge inquired of the parties: (a) whether it was permissible to consider the Postal Service's assertions with respect to Tracking Numbers “7003 3110 0004 8616 **9126**” and “7003 3110 0004 8616 **6126**,” as part of the hearing record, and (b) what impact, if any, did these assertions have upon the propriety of the later revocation. By way of a later reply, Appellant asserted that the Administrative Law Judge may, and should, consider this relevant additional detail.<sup>33</sup> For its part, the Department's post-hearing reply was to the effect that had counsel been aware of the tracking number detail as to item “7003 3110 0004 8616 **9126**,” it would have submitted this data into the record at the time of the hearing.<sup>34</sup>

Perhaps not surprisingly, the parties diverge as to the meaning of the tracking number detail. The Department asserts that the tracking number detail establishes that the Notice of Suspension “was received on August 21, 2006, which could have allowed Mr. Farez over one month to respond to the suspension prior to it becoming a revocation.”<sup>35</sup> Respondent argues that the tracking detail establishes that the Operator, Mr. Farez, “did not receive the

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<sup>29</sup> See, Ex. B.

<sup>30</sup> See, Ex. C.

<sup>31</sup> See, Letter to Counsel of February 1, 2007.

<sup>32</sup> *Id.*

<sup>33</sup> See, February 6, 2007 Letter of Michael C. Hager.

<sup>34</sup> See, February 6, 2007 Letter of Michael A. Sindt.

<sup>35</sup> *Id.*



document” and that he had a “reasonable expectation” to receive mail at his business address in Minneapolis, Minnesota.<sup>36</sup>

On this point, Appellant Ecuadorian Express has the better argument. The hearing record contains no explanation as to why it would take the Postal Service nearly one month to deliver the Notice of Suspension, if the Notice was sent as item “7003 3110 0004 8616 **9126**,” or why a properly addressed item would arrive in Saint Paul, Minnesota, rather than Minneapolis, Minnesota. More problematic still, the record contains no linkages between “C. Snidarich” – the recipient of the item – and Mr. Farez; and it is not clear that any such connections exist. Lastly, what the record does make clear is that Mr. Farez responded promptly when he received the Notice of Revocation<sup>37</sup> – a fact which suggests that when a written communication is received by him, a reply from Mr. Farez follows.

While the Department asserts that under the applicable regulations that the suspension is effective against an Operator within five days of mailing the notice,<sup>38</sup> this point is unavailing because the regulation assumes that the notice would be mailed to the Respondent’s last known address. It is not a sensible (or lawful) construction of the regulation to read it as providing that a suspension of the permit becomes effective upon mailing to *any* address on the globe.<sup>39</sup> In this case, the Department cannot establish that it is more likely than not that item “7003 3110 0004 8616 **9126**” was correctly dispatched to Mr. Farez at his Minneapolis business address.

### **Additional Grounds for Revocation**

At the hearing, the Department raised for the first time its claims that separate and alternate grounds for revocation of the Operator’s Permit are that employees of Ecuadorian Express LLC were providing limousine services:

- (a) more than five days after the mailing of the July 24, 2006 Notice of Suspension;<sup>40</sup>

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<sup>36</sup> See, February 6, 2007 Letter of Michael C. Hager.

<sup>37</sup> See, Test. of C. Farez; *see generally*, Testimony of Rebecca Ellinghuysen.

<sup>38</sup> See, February 6, 2007 Letter of Michael A. Sindt.

<sup>39</sup> As the Minnesota Supreme Court has observed, in order for a notice to be constitutionally sufficient it must inform a party of how government action affects that party’s interests. *See, Schulte v. Transp. Unlimited, Inc.*, 354 N.W.2d 830, 834-35 (Minn. 1984); *accord, Plocher v. Comm’r of Pub. Safety*, 681 N.W.2d 698, 705-06 (Minn. App. 2004) (notice of a license revocation was inadequate where the consequences of government action were not foreseeable from the notice); *Perovich v. Bituminous Consulting & Contracting Co.*, 614 N.W.2d 753, 756 (Minn. App. 2000) (time for appeal did not begin running in a case where the Department of Economic Security did not mail the notice of personal liability for unpaid unemployment taxes to the “individual’s last known address”).

<sup>40</sup> Test. of K. Wiech; Ex. E; *compare also*, Minn. R. 8880.1300 (2) (B) and (3) (2005).

- (b) prior to the May 22, 2006 issuance of permit 372431,<sup>41</sup> and,
- (c) in a vehicle that did not display a valid limousine decal.<sup>42</sup>

As to the first claim, while it is true that the regulations forbid suspended Operators from undertaking limousine services,<sup>43</sup> it is clear that the same due process and notice concerns bedevil these alternate claims by the Department. If the Department failed to establish that it sent notice of the permit suspension to Mr. Farez – and on this record, it has so failed – then the further notice that Ecuadorian Express could be sanctioned with a revocation of its limousine permit if it continued to operate, is likewise defective. A limousine operator would simply not know that it is violating the rules by continuing operations.

Likewise, with respect to the Department's complaints as to the credentialing of vehicles in the Ecuadorian Express fleet, a similar conclusion applies. Because neither the October 9, 2006 Revocation Notice, nor the later Notice and Order for Hearing in this matter, make any reference to these claims, Appellant's first notice of these contentions was when Department officials were on the witness stand. The contested case statute and rules, however, afford Appellant with earlier notice of the claims that it is obliged to meet at the hearing.<sup>44</sup>

## CONCLUSION

For all of these reasons, the best result is for the Department's review process to begin anew. In the view of the Administrative Law Judge the appeal should be granted; the July 24, 2006 Notice of Suspension and the October 4, 2006 Revocation Notice should be vacated; and the Department should issue and serve a new Notice of Suspension, such that Ecuadorian Express LLC might have notice and a new 60 day period within which to come into regulatory compliance.<sup>45</sup>

E.L.L.

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<sup>41</sup> Test. of K. Wiech; Ex. E; *compare also*, Minn. R. 8880.0300 (1) (2005).

<sup>42</sup> Test. of K. Wiech; Ex. E; *compare also*, Minn. R. 8880.0700 (3) (2005).

<sup>43</sup> See, Minn. R. 8880.1300 (2) (B) (2005).

<sup>44</sup> See, Minn. Stat. § 14.58 (2006) (In a contested case hearing, the parties must be given notice of the "issues involved," or where "the issues cannot be fully stated in advance of the hearing," notice must be given "as soon as practicable"); Minn. R. 1400.5600 (2) (D) (2005); *compare also*, Minn. R. 8800.1300 (4) (2005) (Notice of Revocation constitutes the operator's notice of the "right to appear and contest the ... revocation").

<sup>45</sup> *Compare*, Minn. R. 8880.1300 (2) (C) (2005).